IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Suresh Kumar and another.
vs.
Virendra Kumar.

S.B.CIVIL REVISION PETITION NO.400/2004 UNDER SECTION 115 CPC AGAINST THE ORDER DATED 21.9.2004 PASSED BY SHRI UMESH SHARMA, ADDITIONAL DISTRICT JUDGE NO.1, HANUMANGARH IN EXECUTION APPLICATION NO.10/2004.

DATE OF JUDGMENT ::: 13.2.2007

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr.R Joshi, for the petitioners.

None present, for the respondent.

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BY THE COURT:

REPORTABLE

Heard learned counsel for the petitioners as nobody appeared on behalf of the respondent, despite service.

The petitioner is aggrieved against the order dated 21.9.2004 by which the executing court allowed the objection petition filed by the judgment debtor under Section 47 CPC and held that despite the fact that the stay petition was dismissed against the execution of the decree by the appellate court (this Court), the decree cannot be executed because of mere pendency of the appeal. The said view was taken by the executing court on the basis of one judgment of the Hon'ble Apex Court delivered in the case of Union of India and others vs. West Coast Paper Mills Ltd. and another reported in (2004) 2 SCC 747.

Brief facts of the case are that the plaintiff/ respondent filed a suit for injunction and for cancellation of the sale deed dated 19.7.1990 against the petitioners and Bachani Devi, Pushpa Devi and Bhoturam etc. In the suit, the petitioners filed counter claim. The respondent's suit no.45/1990 was dismissed by the learned Additional District Judge No.1, Hanumangarh vide judgment and decree dated 28.2.2003 and the counter claim filed by the petitioners was allowed and a decree was passed in favour of the petitioners against the respondent for removal of encroachment which was made by the respondent in the north side of the plot in dispute.

The decree was against present respondent Virendra Kumar and hence, he preferred regular first appeal before this Court which is registered as S.B. Civil First Appeal No.69/2003 (Virendra Kumar vs. Suresh Kumar and others). The respondent submitted stay petition also in the said first appeal before this Court but that stay petition was dismissed by this Court despite the fact that the appeal was admitted by same order dated 23.7.2003. However, this Court directed the respondents therein (present petitioners) not to raise any construction over the property in question pending disposal of the appeal. It appears from the said order that so far as decree for removal of encroachment of respondent is concerned, the stay petition was dismissed by this Court and to safeguard the interest of respondent (appellant of appeal no.69/2003), the respondents in appeal no.69/2003 (present petitioners) were restrained from raising any construction over the property in dispute. The present respondent submitted another stay petition in appeal no.69/2003 which was dismissed by this Court vide order dated 18.8.2004.

After dismissal of two stay petitions by High Court against the execution of decree, the respondent submitted objection petition before the executing court seeking stay of the execution proceedings. The present petitioners filed detail reply to the objection

petition and pointed out that the High Court has already dismissed the stay petition of the respondent twixe against the execution of decree. Despite this fact, the executing court observed that in view of the judgment of the Hon'ble Apex Court in the case of West Coast Paper Mills Ltd. (supra), the appeal is continuation of suit and the decree becomes executable when the appeal is finally decided by the appellate court.

Hence, this revision petition.

Learned counsel for the petitioners vehemently submitted that the court below took some portion of judgment of Hon'ble Apex Court out of the context and held that the decree cannot become executable unless the appeal is finally decided by the appellate court because of the reason that the appeal is continuation of suit. It is submitted that the controversy in the case of West Coast Paper Mills Ltd. (supra) was entirely different and the Hon'ble Apex Court never meant to say that all decrees against which the appeals have been preferred shall remain inexecutable till the appeal is decided by the appellate court nor the Hon'ble Apex Court meant that even if the stay petition is dismissed by the appellate court against the execution of decree, then also, the decree will remain inexecutable obviously because of the reason that the

appeal is continuation of suit and the decree attains finality as per the final decision of the appeal by the appellate court.

Learned counsel for the petitioner also pointed out that the view taken by the executing court is contrary to the law as Sub-Rule (1) of Rule (5) of Order 41 CPC very specifically provides that mere filing of the appeal shall not operate as stay of the decree or the order impugned in the appeal. In support of this contention, learned counsel for the petitioner relied upon the judgment of the Hon'ble Apex Court delivered in the case of Ratansingh vs. Vijaysingh and others reported in AIR 2001 SC 279 wherein the Hon'ble Apex Court held that the decree becomes enforceable from the date when the decree is passed.

I considered the submissions of learned counsel for the petitioner and perused the reasons given by the court below in the impugned order.

It will be worthwhile to consider the facts of the case of West Coast Paper Mills Ltd. (supra).

In the said case, the respondents were transporting their goods through the branch line to the appellants from Alnavar to Dandeli wherefor the common rate fixed in respect of all commodities on the basis of weight was being levied as freight. A revision was

made in the rate of freight w.e.f. 1.2.1964. The respondents being aggrieved against the said revision of freight filed a complaint petition before the Railway Rates Tribunal. The Tribunal by judgment dated 18.4.1966 declared the said levy as unreasonable. The Union of India being aggrieved against the judgment of the Tribunal dated 18.4.1966 preferred special leave petition before the Hon'ble Apex Court. The leave was granted by the Hon'ble Apex Court and an interim order was also passed directing the Railways only to charge the usual rates without inflation of the distance and the respondents were directed to give bank guarantee to the satisfaction of the Registrar of the Hon'ble Supreme Court for Rs.2 lakhs to be renewed each year until disposal of the appeal. Though the above order was passed but in ultimate line, it is mentioned that the stay petition is dismissed subject to above. Ultimately, the SLP itself was dismissed by Supreme Court on 14.10.1970. Thereafter, a writ petition was filed by the respondent before the High Court for refund of the amount collected by the Railway from the petitioner which was disposed of by the High Court on 29.10.1973 observing that the matters cannot be properly adjudicated in a writ petition filed under Article 226 of the Constitution and the petitioner can avail the ordinary remedy of filing a suit for appropriate relief. On this ground, the High Court

refused to entertain the writ petition under Article 226 of the Constitution of India. In the light of said decision of the High Court dated 29.10.1973, two suits were filed by the respondents on 12.12.1973 and 18.4.1974. In that situation, an objection was raised that the suits are barred by limitation on the ground that the cause of action for filing the suit arose immediately after the judgment was passed by the Tribunal on 18.4.1966 and thus, in terms of Article 58 of the Limitation Act, 1963, the suits could have been filed within a period of three years from the said date. A plea was taken that though the S.L.P. was preferred against the order of the Tribunal, but no stay was granted by the Supreme Court. Thus, the period during which the matter was pending before the Supreme Court would not be excluded in computing the period of limitation. After considering the Sections 14 and 15 of the Limitation Act, the trial court held that the suits have been filed within the stipulated period. The order of the trial court was challenged but the High Court also affirmed the same view. The matter was taken up by Union of India before the Hon'ble Apex Court. Before the Hon'ble Apex Court, it was submitted that the judgment of the Tribunal has been made final by statutory provision under Section 46A of the Indian Railways Act. The said plea was taken because of the reason that the point of consideration was whether the

suits were barred because of the reason that the judgment of the Tribunal became final on the day when it was passed in view of Section 46A of the Indian Railways Act and, therefore, even if any appeal was preferred to challenge the order of Railway Tribunal before Supreme Court, the judgment of the Tribunal could have been executed by the respondents. The Hon'ble Apex Court held that as per Article 136 of the Constitution of India, it confers a special power upon the Hon'ble Apex Court and appeal lies against any order passed by a Court or Tribunal before the Hon'ble Apex Court. The Hon'ble Apex Court observed that once special leave is granted and appeal is admitted, the correctness or otherwise of the judgment of the Tribunal becomes wide open. In such an appeal, the court is entitled to go into both questions of fact as well as law. In such an event, the correctness of the judgment is in jeopardy. After observing so, the Hon'ble Apex Court further observed in para no.15 as under :-

> “15. Even in relation to a civil dispute, an appeal is considered to be a continuation of the suit and a decree becomes executable only when the same is finally disposed of by the court of appeal.”

The above observation of the Hon'ble Supreme Court was interpreted by the executing court as law laying

down that in all civil suits, if an appeal is preferred against the decree, then the impugned decree becomes executable only when the same becomes final by the court of appeal.

The facts mentioned above, in detail, were necessary because of the reason that the point in controversy before the Hon'ble Apex Court in the case of West Coast Paper Mills Ltd. (supra) was entirely different and that was for the purpose of finding out how the limitation for filing the suits in peculiar facts and circumstances, is to be counted.

The Hon'ble Apex Court in para no.16 very specifically held that the starting point of limitation for filing a suit for the purpose of recovery of the excess amount of freight illegally realised would, thus, begin from the date of order passed by this Court (Supreme Court). In para no.17, the Hon'ble Apex Court took note of the fact that the Trial Court as well as the High Court gave benefit to the plaintiffs/ respondents under Sections 14 and 15 of the Limitation Act, 1963 which benefit is available to the person prosecuting for remedy bonafidely in another court.

In such case, the question when the decree will become executable itself was not before the Hon'ble Apex Court nor it could have been because of the facts of the above case. Contrary to it, Order 41 Rule 5(1) CPC is relevant, which is as under :-

> "5. Stay by Appellate Court.- (1) An appeal shall not operate as a stay of proceedings under a decree or order appealed from except so far as the Appellate court may order, nor shall execution of a decree by stayed by reason only of an appeal having been preferred from the decree ; but the Appellate Court may for sufficient cause order stay of execution of such decree.
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> Explanation.- An order by the Appellate Court for the stay of execution of the decree shall be effective from the date of the communication of such order to the Court of first instance, but an affidavit sworn by the appellant, based on his personal knowledge, stating that an order for the stay of execution of the decree has been made by the Appellate Court shall, pending the receipt from the Appellate Court of the order for the stay of execution or any order to the contrary, be acted upon by the Court of first instance."

Order 41 Rule 5(1) unambiguously makes it clear that the decree becomes operative and executable from the date on which it has been passed. Unless, the decree becomes executable, there cannot arise question of seeking any stay against execution. Not only this, but there is statutory restriction upon the court of appeal against staying the execution of decree merely by reason of appeal having been preferred to challenge the decree. Order 41 Rule 5(1) CPC, therefore, clearly suggests that the decree becomes executable forthwith unless its operation is deferred by the decree itself

or by the order of the appellate court. Further the decree becomes executable even before limitation to challenge the decree expires which is clear from Sub-rule (2) of Rule 5 of Order 41 CPC. Once the decree becomes executable, it can be stayed only in accordance with law. For this purpose, not only provision has been made for obtaining stay from the appellate court but even before preferring appeal, stay against execution of decree can be sought from the executing court itself under Sub-rule (2) of Rule 5 of Order 45 CPC which provides that where an application for stay before the expiry of time allowed for appealing therefrom, the court which passed the decree may on sufficient cause being shown, order execution to be stayed. Therefore, from Sub-rule (2), it is clear that even before expiry of period of limitation expiry of which makes the decree final, the decree is executable and its stay can be granted by the executing court even during the period of appeal.

The question when the decree becomes enforceable and executable was directly before the Hon'ble Supreme Court in the case of Ratansingh (supra). The Hon'ble Supreme Court in the case of Ratansingh (supra) held that “normally a decree or order becomes executable from its date. But cases are not unknown when the decree becomes enforceable on some future date or on

the happening of certain specified events." and thereafter, laid down that, "Filing of an appeal would not affect the enforceability of the decree, unless the appellate court stays its operation."

In the said case of Ratansingh (supra), the decree was passed on 1.8.1973 by the appellate court which superseded the decree passed by the trial court. The appeal was preferred against the appellate decree before the High Court. That appeal was dismissed by the High Court on the ground of delay holding the appeal barred. The Hon'ble Apex Court held that said order of rejection of appeal as barred by time is not a decree and rejection of application for condonation of delay and consequential dismissal of the appeal as time barred is not decree. In that situation, the Hon'ble Apex Court held that since no decree was passed by the High Court in second appeal, the decree of the first appellate court remained unaffected and the enforceability once commenced remained undisturbed for a period of 12 years therefrom. The execution process initiated by the appellant long after the expiry of 12 years from 1.8.1973 is thus irretrievably barred. Therefore, in view of the law laid down by the Hon'ble Apex Court in Ratansingh's case (supra), it is also clear that the decree becomes executable from the date of decree and mere filing of appeal against the decree cannot make the decree inexecutable. The decree remains

executable but its execution can be suspended by the order of the appellate court as per Order 41 Rule 5(1) CPC or by the executing court as per Order 45 Rule 2 CPC.

In view of the above reasons, this revision petition is allowed, the order dated 21.9.2004 is set aside and the executing court shall proceed to execute the decree in accordance with law.

(PRAKASH TATIA), J.

S.Phophaliya